(16)

Supreme Court, U.S.
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No. 01-584

In The

Supreme Court of the United States

WANDA ADAMS, *et al.*,

Petitioners,

v.

FLORIDA POWER CORPORATION and FLORIDA PROGRESS CORPORATION,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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REPLY POINTS

1. The ADEA's Clear Terms, and This Court's Previous Construction of Those Terms, Control This Case.

By its terms, the ADEA makes it "unlawful for an employer to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age." 29 U.S.C. § 623(a)(2). In *Griggs v. Duke Power*, 401 U.S. 424 (1971), and through the cases that followed it, the Court has held that essentially identical language in Title VII permits plaintiffs to prove discrimination through the disparate impact method where the employer has applied a facially neutral selection process to its employees and that process has disproportionately affected blacks or women adversely. Given that the prohibitions of the ADEA were taken *in haec verba* from Title VII, *Lorillard v. Ponds*, 434 U.S. 575, 584 (1978), this would normally be the end of any debate: the ADEA would be read *in pari materia* with Title VII, and the disparate impact method of proving discrimination would apply to the ADEA.

Until three Justices of the Court questioned this understanding in a concurring opinion in *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), there was unanimous agreement in the lower courts that disparate impact analysis applied to the ADEA. Pet. Br. 6, 37. The Department of Labor and the EEOC had also construed the ADEA to

apply to age-neutral actions by employers.[1] Against the backdrop of these interpretations of the ADEA, Congress passed the OWBPA in 1990 to protect worker rights to bring ADEA claims, by ensuring that employees terminated in corporate downsizings were provided statistics to evaluate whether there had been a disproportionate impact upon older workers. *See* Academy Fla. Trial Lawyers Br. 3-12.

Since *Hazen Paper*, however, there have been arguments regarding whether the disparate impact method of proof should apply in age discrimination cases as it does in sex and race discrimination cases. These arguments (and some new ones) are presented in the briefs of Florida Power and its aligned *amici curiae*. Each of the arguments fails, however.

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[1] Florida Power correctly observes that the United States, on behalf of a defendant federal employer (per a U.S. Attorney's office, with an Assistant Attorney General co-signing), once filed a brief in a court of appeals arguing against the disparate impact method of proof. Resp. Brief at 46-47. But Florida Power incorrectly claims that "consistent with the longstanding position of the DOJ, the Solicitor General has chosen not to defend the EEOC's interpretations" of the ADEA (*id.* at 45). A copy of the Solicitor General's petition for a writ of certiorari in *EEOC v. Francis W. Parker School*, No. 94-1558, arguing forcefully in favor of the EEOC's interpretation, is attached as an appendix to this reply brief.

2. The "Reasonable Factors Other Than Age" Defense Reflects Potential Liability for Age-Neutral Actions That Are Not Based on Reasonable Factors.

Section 4(f)(1) of the ADEA provides a defense to employers who have engaged in actions that are "otherwise prohibited" by the Act, if the employer has based its "differentiation" between older and younger workers on "*reasonable* factors other than age." (Emphasis added). In the opening brief, the Adams Group argued that the reasonable factors defense reflected the potential liability of employers whose facially neutral policies discriminate in violation of Section 4(a). Pet. Br. 27-32; *see also* Nat'l Empl. Lawyers Ass'n Br. 8-22. Florida Power contends that the defense, which does not exist under Title VII, *precludes* potential liability for age neutral actions. Resp. Br. 10-14.

First, Florida Power presents an implausible interpretation of the reasonable factors language that renders the provision—by the company's own concession—"technically unnecessary," but purportedly relevant to "remove argued ambiguities, reassure skeptics, and/or constrain future interpretation by administrative agencies and courts." Resp. Br. 13. But then Florida Power cites no legislative authority or case law that even suggests the addition of the provision was technically unnecessary. *Cf.* Pet. Br. 27-32; Nat'l Empl. Lawyers Ass'n Br. 8-22.

Second, the company contends that Title VII's incorporation of the Equal Pay Act's (EPA's) "*any* other factor other than sex" affirmative defense means that there is no liability under Title VII for gender neutral pay practices

having a disparate impact on a gender, so the ADEA's "*reasonable* factors other than age" defense should also preclude disparate impact liability under that Act. Resp. Br. 28. The argument arises from *County of Washington v. Gunther*, 452 U.S. 161 (1981), a case in which the Court held that the EPA's "*any* other factor" defense applied to gender neutral claims under Title VII. *Gunther* did not hold that disparate impact was unavailable, but did indicate that an employer's defense to such a claim would be simply to show that its actions were based on sex neutral and bona fide factors.[2] *Id.* at 170-71.

Third, Florida Power maintains that there is no reason to believe Congress was aware of the EPA's similar language when it enacted the ADEA and thus there is no reason to conclude that Congress intended the word "reasonable" to have any meaning beyond the less-adorned defense incorporated into Title VII from the EPA. Resp. Br. 40-41. The "*any* other factor other than" defense was incorporated into Title VII by the Bennett Amendment shortly before the ADEA was passed, *Gunther*, 452 U.S. 171-72, and the defense and the "*reasonable* factors other than age" defense share a common genealogy: Secretary Wirtz administered and enforced the EPA when the ADEA was drafted. Mack A. Player, Note, *Wards Cove Packing or Not Wards Cove Packing? That is Not The Question: Some Thoughts on Impact Analysis Under The Age*

[2] Florida Power likewise relies on *Los Angeles v. Manhart*, 435 U.S. 702, 710 n.20 (1978), to suggest that the EPA's "any other factor" defense precludes all disparate impact claims under that Act. (Resp. Br. 28). The suggestion overlooks that in *Manhart* the Court held that if pay practice *was indeed* based on a factor other than sex the employer would not be subject to disparate impact liability. 435 U.S. at 710 n.20.

Discrimination in Employment Act, 31 U. RICH. L. REV. 819, 833-34 (1997).[3] Congress apparently did mean something more when it added the word "reasonable."[4]

Fourth, Florida Power argues that the ADEA's "reasonable factors other than age" defense is meant to apply to mixed-motive disparate treatment cases, so conduct intentionally taken "because of age" that would indeed be "otherwise prohibited" because it discriminated against individual employees is acceptable—as long as the differentiation between older and younger workers is based on factors *in addition to* age, and those factors are reasonable. Resp. Br. 11, 36, 38. *But see* Pet. Br. 24. Mixed motive cases, however, assume that there is an issue of whether the employer's improper motivation actually caused it to act in violation of the law. *See, e.g., Price Waterhouse v. Hopkins*, 490 U.S. 228, 242 (1989) ("an employer shall not be liable if it can prove that, even if it

[3] It is curious that Florida Power is willing to put so many of its eggs in Secretary Wirtz's basket, but then overlooks the Secretary's role in this instance, and sees only a mysterious coincidence between the similar-but-materially-different EPA/Title VII defense and ADEA defense.

[4] Florida Power nonetheless also urges that requiring an employer to show that its actions were based on reasonable factors is no more than requiring that an explanation not be pretextual. Resp. Br. 10. In disparate treatment cases, however, "the jurisprudence has repeatedly noted the ADEA does not restrict an employer's authority to discharge an employee for no reason, for a good reason or even for a wrong reason." *See, e.g., Walker v. Southern Holdings*, 934 F. Supp. 197, 199 (M.D. La. 1996) (citing *Nix v. WLCY Radio/Rahall Communications*, 738 F.2d 1181 (CA11 1984)). Requiring an employer to justify the reasonableness of its actions can only make sense if those actions are "otherwise prohibited."

had not taken gender into account, it would have come to the same decision regarding a particular person"). The ADEA's reasonable factors defense, in contrast, expressly assumes that the employer's "action" would indeed be "prohibited," but then excuses the action if it was "based on" reasonable factors other than age.

Finally, Florida Power asserts that intent cannot be a consideration in disparate impact cases, so the reasonable factors defense for pure motivations—despite otherwise prohibited actions—means there can be no liability for disparate impact. Resp. Br. 36. The assertion overlooks the Court's analyses in *Watson* and *Hazen Paper*. In *Watson*, the Court explained the need for disparate impact analysis: "Furthermore, even if one assumed that any such [intentional] discrimination [in the use of subjective factors] can be adequately policed through disparate treatment analysis, the problem of subconscious stereotypes and prejudices would remain * * * ." *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 990 (1988). In *Hazen Paper*, the Court explained that the purpose of the ADEA was largely to address employment actions taken "on the basis of inaccurate and stigmatizing stereotypes" about older workers, but also stated that "[w]hen the employer's decision *is* wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears." *Hazen Paper*, 507 U.S. at 610. Thus, while it is true that disparate impact does not require the plaintiff to prove the defendant's discriminatory motive, *id.* at 609 (citation omitted), disparate impact under the ADEA does permit the defendant to prevail by proving that its decision was indeed "*wholly* motivated by factors other than age." *Id. at 610* (emphasis added). The

reasonable factors other than age defense permits precisely this.

3. Prior to 1993, Not One Court Had Held that the Disparate Impact Theory Was Inapplicable to the ADEA.

Florida Power argues that Congress could not assume that the disparate impact doctrine was applicable when it enacted the OWBPA (Resp. Br. 48-50) despite the fact that numerous courts of appeals had so held and this Court had denied certiorari on the issue. According to Florida Power, this is so because one Justice of this Court (now the Chief Justice) issued a dissent from a denial of certiorari in 1981. That assertion strains credulity. Further, the idea that Congress would consider persuasive a brief filed by the United States, in its capacity as an employer, to dismiss workplace bias claims, in the face of contrary law in six circuits is preposterous. The notion is also contrary to the position of the agency charged with administering the ADEA in deciding whether it was necessary to codify such precedent. The watchdog did not bark because there was no stranger in the yard, only an unbroken decade-long acceptance by the judicial and administrative branches, that the disparate impact doctrine was the law.[5]

In the event that this Court concludes that the statutory language of section 4(a)(1) and 4(a)(2) is ambiguous, "traditional methods of statutory interpretation" are justified to resolve the ambiguities. *See* Alfred W.

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[5] A. Conan Doyle, *Silver Blaze*, THE COMPLETE SHERLOCK HOLMES 383 (1938).

Blumrosen, Modern Law: The Law Transmission System and Equal Employment Opportunity, pp. 100-123 (University of Wisconsin Press, 1993). These methods include examining the Floor Manager's undisputed statement at the time of submission of the OWBPA bill to the Senate, after a year of Congressional activity, that workers with counsel should be able to make a judgment about whether they had evidence to support litigation under the ADEA or take a settlement offer. Contrary to Florida Power's view (Resp. Br. 50), the only statistics that employees would need are the ones Congress required. Congress did not require that employers supply all reasons for large scale discharge, but only those that would inform the judgment as to whether the ADEA was implicated.

The OWBPA argument is *not* about ratification by silence, as Florida Power would characterize it. Rather, the argument is about the understanding that Congress had at the time as to what the law was, in order to make sense of the limitations on waivers in the OWBPA with respect to "a group or class of employees." Florida Power's brief has carefully avoided this issue.

4. The Parade of Horribles Promised by Florida Power and its *Amici* Will Not Come to Pass.

Florida Power and its *amici* predictably promise a parade of horribles if workers are permitted to use the disparate impact method of proving employment discrimination in ADEA cases. Resp. Br. 19-26; Pac. Legal Found. Br. 17-24; Chamber Br. 3-4. They similarly contend that disparate impact analysis is inappropriate for the

ADEA because, unlike with race and gender discrimination, age discrimination is often based on *correct* stereotypes about older workers. *See, e.g.*, Chamber Br. at 8 ("adverse assumptions about older employees' abilities * * * sometimes will prove true."). To the extent age *is* sometimes a logical explanation for why an employer would not want older workers, disparate impact will hardly force employers to employ older workers against their wishes because Congress has already created defenses—including the reasonable factors defense—that permit employers to act adversely toward older workers.[6] To deny application of the disparate impact theory because stereotypes are *sometimes* accurate, as Florida Power and its *amici* suggest, however, would endorse the idea that age should be a *general* proxy for competence, untethered to the ADEA's statutory scheme. This is an idea in direct conflict with the Act's purpose of promoting employment of older persons based on their ability rather than age. 29 U.S.C. § 621(b).

In any event, the parade of horribles argument is flawed because it overlooks the years that the disparate impact method was presumed to apply to the ADEA. *See, e.g.*, App. 16a (Solicitor General's petition noting number of EEOC actions based on disparate impact prior to 1995).

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[6] Both Title VII and the ADEA recognize that not all discrimination is arbitrary and unlawful by providing statutory defenses. For example, some facially discriminatory policies will not be deemed "arbitrary" if the employer can demonstrate that the classification is a bona fide occupational qualification reasonably necessary to the particular business. *See* Title VII § 703(e), 42 U.S.C. § 2000e-2(e) and ADEA § 4(f)(1), 29 U.S.C. § 623(f)(1).

Florida Power has not shown how during those years there was a deluge of additional ADEA cases, nor that gathering evidence demonstrating business necessity was unduly difficult for non-discriminating employers, nor that quotas were common responses, nor that preferential treatment of older workers was ever afforded. And the availability of disparate impact liability hardly means that such an approach will be successful. As Florida Power correctly observed in opposition to the Adams Group's petition for a writ of certiorari, "only the Ninth Circuit has actually upheld a disparate impact claim on appeal since *Hazen Paper.*" Brief in Opp. at 11.

Florida Power and its *amici* seek to recast the disparate impact method of proof as something revolutionary that would be added to older workers' arsenal and alter ADEA litigation to the ruination of employers. But before *Hazen Paper* older workers had disparate impact available to them throughout the country and there were relatively few disparate impact cases brought under the theory. Due to the statutory defenses available to employers, even fewer of those cases were successful.

5. The Secretary's Finding that Age Animus is Usually Not Behind Age Discrimination Supports the Use of Disparate Impact.

Many racial discrimination claims, and some sex discrimination claims, are based on the animus of an employer. Clearly, however, there are numerous racial and sex discrimination claims based on stereotypes rather than animus. Florida Power argues that there should be no ADEA liability for practices that are fair in form but discriminatory in operation against older workers

because animus is not behind age discrimination. *But see Cooley v. Carmike Cinemas*, 25 F.3d 1325, 1329 (CA6 1994) (age animus). The Chamber of Commerce also asserts that "[t]he ADEA's express focus on arbitrary discrimination demonstrates that [the ADEA] was intended to be narrower in scope than Title VII." Chamber Br. 9 (citations omitted).

The logic fails for several reasons: First, there has never been *any* distinction between Title VII disparate impact cases based on stereotypes and those based on discriminatory animus. Second, subtler sources of age bias make disparate impact even *more* important to detect "arbitrary" and unconscious age stereotypes. Third, the argument does not adequately account for the Court's statement in *Griggs* that disparate impact is a method for removing "artificial, *arbitrary*, and unnecessary barriers." 401 U.S. at 431 (emphasis added). Fourth, the Secretary's 1965 Report addresses the same kinds of disparate impacts that *Griggs* discusses—disproportionately lower test scores, lower educational attainment, (and also lesser physical vigor)—to conclude that stereotypes produce irrational age-based discrimination in the form of neutral job criteria that are unrelated to business necessity. J.A. 359-60, 371-73. Fifth, the assertion assumes that disparate impact was never clarified beyond *Griggs* before the Civil Rights Act of 1991. By the time of *Watson*, it was clear that disparate impact existed for the purpose of detecting stereotypes, and this Court later observed in *Hazen Paper* that the ADEA was largely passed to address the consequences of inaccurate stereotypes about older workers. *Watson*, 487 U.S. at 989-90; *Hazen Paper*, 507 U.S. at 610.

Sixth, the 11th hour and unusual political history of Congress' inclusion of sex in Title VII does not suggest that Congress considered historical animus against women in passing the Act, *see Price Waterhouse v. Hopkins*, 490 U.S. at 244 n.9, yet it is undisputed that disparate impact may be used to challenge gender discrimination. *Dothard v. Rawlinson*, 433 U.S. 321 (1977).

6. The ADEA's Differences with Title VII Are Not Controlling.

Florida Power asserts that disparate impact liability is not available under the ADEA because the ADEA's *procedural* provisions come from the Fair Labor Standards Act and permit jury trials, while Title VII does not permit disparate impact jury trials. Whether construction of Title VII or the FLSA is more appropriate to understanding a given provision in the ADEA should hinge on the origin of that provision. While it is true that the procedures of the ADEA come largely from the FLSA, the prohibitions —*i.e.*, the actual provisions that determine whether the neutral practices falling disproportionately on protected groups without a reasonable basis are prohibited—came directly from Title VII.

When it amended Title VII in 1991 to provide expressly for disparate impact liability and define the ambit of that liability, Congress did choose to include in the new provision a prohibition on jury trials. 42 U.S.C. § 1981a(a)(1) & (c). Such an alteration does not alter the holding in *Griggs* that Title VII's prohibitions (shared by the ADEA): "proscribe[ ] not only overt discrimination but also practices that are fair in form, but discriminatory

in operation." *Griggs v. Duke Power Co.*, 401 U.S. at 431. Not a word in *Griggs* remotely suggested that the Court's ruling was influenced by the fact that jury trials were not available.

7. It is Not Difficult to Conduct a Meaningful Statistical Analysis.

According to Florida Power and the Equal Employment Advisory Council, the disparate impact method of proof cannot function under the ADEA because age is fluid and statistical analysis is simply too difficult for juries since the ADEA "prohibits discrimination on the basis of age and not class membership." Resp. Br. 22-23 (quoting *O'Connor v. Consolidated Coin Carriers*, 517 U.S. 308, 313 (1996)); E.E.A.C. Br. 17-19. There are two flaws with this outdated argument. First, any data captures a moment in time of a particular employer and would fix the age comparison for that time, *i.e.*, the data before and after a reduction-in-force. The fluid workplace argument fails to reflect the changing work patterns and movement of all workers. Many older individuals change jobs and have only a few years of service with one employer at older ages. Long gone are the days when age and years of service or experience in one field had strong correlations. It is now more common for all workers to change jobs frequently.

Second, there are numerous ways by which such a snapshot of an employer's workforce composition could easily be verified. For example, a statistical analysis of the median age of the workers terminated and the median age of the workers retained in a downsizing—coupled with statistical evidence of disparate impact on workers over the age of 40—might provide a

worthwhile means of detecting age discrimination. Under such a model, the smaller the disparity in median ages, the greater the disparity in impact would have to be. In all cases, however, the disparity would have to be at least as substantial as it is in other discrimination cases.

8. The Adams Group Has Adequately Alleged Disparate Impact.

The district court's ruling was made as a pure matter of law, so the allegations in the complaint upon which the court necessarily relied are controlling in this interlocutory proceeding. The Adams Group has alleged that Florida Power's "reduction in force" had a "disproportionate impact on older employees." (J.A. 26-27). Florida Power argues, however, that the Adams Group failed to identify with adequate specificity the action Florida Power undertook that had a disparate impact on older workers. Florida Power's brief was filed the day before *Swierkiewicz v. Sorema N.A.*, 122 S. Ct. 992 (2002), was decided; there is no heightened pleading standard for ADEA cases.[7]

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[7] Florida Power appears flummoxed because the Adams Group *also* refers to the gross statistics available to them at the point in the case when the district court ruled, *i.e.*, over 70% of the workers terminated were over 40. Resp. Br. 33 (citing Pet. Br. 15, 34). While that number does not have independent significance, the statistician retained by the Adams Group to conduct a preliminary review of the evidence available at the time of the district court's ruling did, in fact, indicate that a reduction in force originating from senior management and carried out by those at lower levels had had a disparate impact upon Florida Power's older workers after senior management set parameters for the reduction in force. J.A. 283-84; *see also id.* at 298-304 (memorandum in opposition to decertification describing facts known at time of district court's ruling).

CONCLUSION

The judgment of the court of appeals should be reversed. The case should be remanded to the district court for further proceedings to allow the petitioners to proceed with their disparate impact claims under the ADEA.

Respectfully submitted,

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March 2002

No. 94-1558

In the Supreme Court of the United States

OCTOBER TERM, 1994

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PETITIONER

v.

FRANCIS W. PARKER SCHOOL

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*, prohibits disparate impact discrimination.

2. If so, whether the ADEA prohibition against disparate impact discrimination protects applicants for employment.

* * *

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the Equal Employment Opportunity Commission, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-16a) is reported at 41 F.3d 1073. The opinion and orders of the district court (App., *infra*, 17a-18a, 19a-41a, 42a-43a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 21, 1994. A petition for rehearing was denied on November 18, 1994. App., *infra*, 44a-45a. By order dated February 9, 1995, Justice Stevens extended the time

within which to file a petition for a writ of certiorari to and including March 18, 1995 (a Saturday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*, and Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, are reproduced in the Appendix, *infra*, 46a-48a.

STATEMENT

1. Francis W. Parker School (respondent) is a private K-12 school in Chicago, Illinois. App., *infra*, 19a. Respondent's collective bargaining agreement establishes a 22-step pay system for incumbent teachers. *Ibid.* Under that system, each year of additional experience as a teacher for respondent produces a corresponding increase in salary. *Ibid.* In 1989, for example, step one on the salary chart corresponded to a salary of $22,000, while step 22 on the salary chart corresponded to a salary of approximately $46,000. *Id.* at 19a-20a. Under the collective bargaining agreement, the principal has the discretion to determine the entry salary of all new teachers. *Id.* at 27a. After teachers have been hired, they then progress one step in salary each year. *Ibid.*

As a matter of practice, respondent determines the entry salary for new teachers based on their years of prior relevant experience. App., *infra*, 2a. For example, if the principal determines that a teacher has five years of relevant experience, the teacher would receive an entry

salary that corresponds to step five on respondent's salary chart. Consistent with that policy, when respondent sets a salary cap for a teaching vacancy, it refuses to consider applicants whose experience level would require them to be paid above the cap. *Id.* 20a-21a & n.1, 22a-23a, 25a. That practice of refusing to consider experienced applicants for certain positions is the policy at issue in this case.

In the fall of 1988, one of respondent's drama teachers left the school and respondent began searching for a replacement. App., *infra,* 20a. For budgetary reasons, respondent decided that it could offer no more than $28,000 for that position. *Id.* at 20a-21a. Under respondent's salary system, teachers with more than six years of experience earn more than $28,000. *Id.* at 21a n.1. Respondent therefore limited its search for a new drama teacher to persons who had six years of relevant experience or less. *Id.* at 20a-21a & n.1.

Harold Johnson, who was 63 years old and had 30 years of teaching experience, applied for the vacancy. App., *infra,* 21a-22a & n.3. Respondent rejected Johnson's application. *Id.* at 22a-23a. Respondent told Johnson that he could not be hired because his experience level required that he receive a higher salary than respondent could afford to pay. *Ibid.* Respondent then hired a person in her 20s, who had approximately one year of relevant experience. *Id.* at 21a.

Petitioner Equal Employment Opportunity Commission (EEOC) filed suit against respondent alleging that its conduct violated the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.* App., *infra,* 23a.

The EEOC did not challenge respondent's right to set a salary cap for teaching vacancies. *Id.* at 32a. Rather, the EEOC challenged respondent's practice of precluding applicants, whose experience level would qualify them for a higher salary, from competing for vacancies at the salary dictated by the cap. *Ibid.* Relying on a disparate impact theory of discrimination, the EEOC asserted that this practice violated the ADEA because it arbitrarily screened out persons 40 years of age and older at a much higher rate than persons under 40. *Id.* at 32a, 38a-39a.*

2. The district court initially refused to grant respondent's motion for summary judgment. App. *infra,* 19a-41a. The district court found that respondent's practice of precluding experienced teachers from competing for positions with salary caps when their experience level required a higher salary under respondent's salary system had a disproportionate impact on persons 40 years of age and older. *Id.* at 39a-41a. In addition, the court noted that respondent's summary judgment motion did not contain any evidence that it had a business justification for this practice. *Id.* at 38a. Accordingly, the court concluded that respondent was not entitled to summary judgment. *Id.* at 41a.

After this court decided *Hazen Paper Co. v. Biggins,* 113 S. Ct. 1701 (1993), respondent sought reconsideration

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* The EEOC also alleged that respondent's conduct violated the ADEA under a disparate treatment theory of liability. App., *infra,* 24a. The district court granted summary judgment against the EEOC on that theory, and the EEOC did not appeal from that determination. *Id.* at 42a-43a. That theory of liability is therefore not at issue here.

of its motion for summary judgment. The district court denied the motion, reasoning in part that "*Hazen* does not change the law concerning disparate impact analysis." App., *infra*, 43a.

Respondent then filed a new motion for summary judgment, and this time the district court granted it. App., *infra*, 17a-18a. The court reasoned that under *Hazen Paper*, evidence that a practice excludes a disproportionate percentage of workers 40 years of age and older "is not enough, standing alone, to support ADEA liability." *Id.* at 18a.

3. A divided panel of the court of appeals affirmed. App., *infra*, 1a-16a. The majority concluded that *Hazen Paper* precludes the use of disparate impact theory under the ADEA. *Id.* at 5a-6a. Although the court of appeals acknowledged that *Hazen Paper* was a disparate treatment case, it concluded that the Court's analysis in that case was "instructive." *Id.* at 5a. Relying on the statement in *Hazen Paper* that disparate treatment "captures the essence of what Congress sought to prohibit in the ADEA" (113 S. Ct. at 1706), the court of appeals held that "decisions based on criteria which merely tend to affect workers over the age of forty more adversely than workers under forty are not prohibited." App., *infra*, 5a-6a.

The court concluded that this interpretation was supported by the ADEA's exception for differentiations based on "reasonable factors other than age." App., *infra*, 6a-7a. That exception, the court determined, "suggests that decisions which are made for reasons independent of

age but which happen to correlate with age are not actionable under the ADEA." *Ibid.*

The court rejected the argument that because the language in the ADEA mirrors the language in Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and Title VII has been interpreted by this Court to prohibit disparate impact discrimination, the ADEA must prohibit disparate impact discrimination as well. App., *infra*, 7a-8a. The court reasoned that the statutory provision in Title VII that has been interpreted to prohibit disparate impact discrimination applies to applicants for employment, while the corresponding provision in the ADEA does not. *Ibid.*

The court of appeals then held that the EEOC was required to prove that respondent's practice of precluding teachers from competing for positions with salary caps when their experience level required a higher salary under respondent's salary system was "predicated on some stereotype, conscious or unconscious." App., *infra*, 9a. Because the EEOC did not allege that this practice was "a subterfuge for the belief that older teachers are less effective than younger teachers," the court of appeals held that the district court had properly granted summary judgment in favor of respondent. *Ibid.*

Judge Cudahy dissented from the panel's decision. App., *infra*, 10a-16a. He agreed with the majority that *Hazen Paper* limits ADEA liability to decisions based on "misperceptions about the competence of older workers." *Id.* at 10a. He concluded, however, that disparate impact analysis is an appropriate method for determining

whether an employment practice is based on age-related stereotypes. *Ibid.*

REASONS FOR GRANTING THE PETITION

The court of appeals has held that the ADEA does not prohibit disparate impact discrimination. That holding conflicts with the holdings of three other circuits; it is inconsistent with this court's interpretation of Title VII, upon which the ADEA was modelled; and it significantly narrows the scope of the protection afforded by the ADEA. The court of appeals also erred in holding that the ADEA does not prohibit disparate impact discrimination against applicants for employment. Review by this Court is therefore warranted.

1. This court has recognized a distinction between disparate treatment and disparate impact theories of employment discrimination. Disparate treatment occurs when an employer treats some people less favorably than others because of a protected characteristic. When disparate treatment is alleged, proof of discriminatory motive is required. *Hazen Paper,* 113 S. Ct. at 1705. In contrast, disparate impact discrimination occurs when an employment practice that is facially neutral affects one group more harshly than another and is not shown to be job-related. When disparate impact discrimination is alleged, proof of discriminatory motive is not required. *Ibid.*

Respondent's practice of refusing to permit experienced teachers to compete for positions with salary caps when their experience level would require them to be paid at a higher salary under respondent's salary system is an example of disparate impact discrimination. That

practice, while facially neutral, has the effect of screening out persons 40 years of age and older at a much higher rate than persons under 40 years of age. App., *infra,* 38a-39a. The only justification respondent offers for that practice is its desire to limit the salary of the teachers that it hires to an amount within its budget. That interest can be fully served by setting a salary cap and then permitting persons of all experience levels to compete for the position at the salary dictated by the cap. Respondent's practice of refusing to consider applicants who are willing to work for the amount dictated by the cap simply because their experience level would require a higher salary under respondent's salary system therefore constitutes the very kind of arbitrary barrier to employment opportunity that the disparate impact theory of discrimination condemns. See *Griggs v. Duke Power Co.,* 401 U.S. 424, 431 (1971).

The court of appeals did not hold otherwise. Rather, it held that the ADEA simply does not prohibit disparate impact discrimination. The court specifically stated that the ADEA is violated only when the challenged practice is "based on misperceptions about the competence of older workers" and that "decisions based on criteria which merely tend to affect workers over the age of forty more adversely than workers under forty are not prohibited." App., *infra,* 6a. Because the EEOC had not alleged that the practice challenged in this case was "a subterfuge for the belief that older teachers are less effective than younger teachers," the court affirmed the district court's award of summary judgment against the EEOC. *Id.* at 9a.

2. The Seventh Circuit's decision in this case conflicts with decisions from the Second, Eighth, and Ninth

Circuits. Those circuits have all squarely held that the ADEA prohibits disparate impact discrimination. *Geller v. Markham*, 635 F.2d 1027, 1032-1034 (2d Cir. 1980) (practice of limiting applicants to persons with less than five years of experience violates the ADEA), cert. denied, 451 U.S. 945 (1981); *Leftwich v. Harris-Stowe State College*, 702 F.2d 686, 690-692 (8th Cir. 1983) (practice of reserving positions for non-tenured faculty violates the ADEA); *EEOC v. Borden's, Inc.*, 724 F.2d 1390, 1394-1395 (9th Cir. 1984) (denial of severance pay to those eligible to retire violates the ADEA). While rejecting disparate impact claims based on the facts before them, the remaining circuits that have addressed the question have all assumed that the ADEA prohibits disparate impact discrimination. *Holt v. Gamewell Corp.*, 797 F.2d 36, 37 (1st Cir. 1986); *Massarsky v. General Motors Corp.*, 706 F.2d 111, 117 (3d Cir.), cert. denied, 464 U.S. 937 (1983); *Wooden v. Board of Educ.*, 931 F.2d 376, 379 (6th Cir. 1991); *Faulkner v. Super Valu Stores, Inc.*, 3 F.3d 1419, 1428 (10th Cir. 1993); *MacPherson v. University of Montevallo*, 922 F.2d 766, 770-771 (11th Cir. 1991); *Arnold v. United States Postal Serv.*, 863 F.2d 994, 998 (D.C. Cir. 1988), cert. denied, 493 U.S. 846 (1989). The Seventh Circuit is the only circuit to have held that the ADEA does not prohibit disparate impact discrimination.

The conflict in the circuits on this issue is unlikely to abate. The Seventh Circuit denied the EEOC's suggestion for rehearing en banc in this case. App., *infra*, 44a-45a. And while the Seventh Circuit has read *Hazen Paper* to preclude disparate impact analysis under the ADEA, the Eighth and Ninth Circuits have both continued to apply disparate impact analysis in post-*Hazen Paper* cases. *Haughton v. Sipco, Inc.*, 38 F.3d 953, 958-959 (8th Cir. 1994);

EEOC v. Local 350, Plumbers & Pipefitters, 998 F.2d 641, 646, 648 n.2 (9th Cir. 1992). This Court should grant certiorari to resolve the conflict in the circuits created by the Seventh Circuit's decision in this case.

3. a. The availability of disparate impact analysis under the ADEA follows from a line of cases beginning with this Court's decision in *Griggs*. At issue in *Griggs* was the proper construction of Section 703(a)(2) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a)(2) (1970). As originally enacted in 1964 (as well as at the time of the Court's decision in *Griggs* in 1971), Section 703(a)(2) made it unlawful for an employer "to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." See 401 U.S. at 426 n.1. In *Griggs*, the Court interpreted Section 703(a)(2) to prohibit practices that have a disparate impact on groups protected by Title VII and that are not shown to be job-related. 401 U.S. at 431-432. This Court has repeatedly reaffirmed that interpretation. *E.g., Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 986-991 (1988); *Connecticut v. Teal*, 457 U.S. 440, 445-449 (1982); *Dothard v. Rawlinson*, 433 U.S. 321, 328-329 (1977).

Congress enacted the ADEA in 1967, three years after it enacted Title VII. Section 4(a)(2) of the ADEA, 29 U.S.C. 623(a)(2), contains language that is identical to the language in Section 703(a)(2) of Title VII that was construed in *Griggs*, except that the ADEA language substitutes age for the categories of discrimination prohibited by Section 703(a)(2). By adopting the same language that it had used

in Title VII, Congress manifested its intent to extend to older workers the same protection against discrimination that it had extended to the groups protected by Title VII three years earlier. See *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979); *Lorillard v. Pons*, 434 U.S. 575, 584 (1978). Because that language has been authoritatively construed by this Court to reach disparate impact discrimination under Title VII, it should receive the same construction under the ADEA.

b. The court of appeals concluded that the ADEA does not prohibit disparate impact discrimination for two reasons. Neither is persuasive.

First, the court concluded that *Hazen Paper* effectively forecloses reliance on disparate impact theory. App., *infra*, 5a-6a. *Hazen Paper*, however, was a disparate treatment case. There, the Court unanimously held that a decision based on a factor that is empirically correlated with age, such as pension status, does not constitute disparate treatment under the ADEA. 113 S. Ct. at 1705. Because the plaintiff in *Hazen Paper* relied solely on a disparate treatment theory of liability, the Court did not address the question whether a decision based on a factor empirically correlated with age could be challenged under a disparate impact theory of liability. *Id.* at 1706. The Court specifically stated that "we have never decided whether a disparate impact theory of liability is available under the ADEA, and we need not do so here." *Ibid.* (citation omitted); see also *id.* at 1710 (Kennedy, J., concurring) (joining the Court's opinion on the understanding that the Court had reserved the question whether disparate impact theory is available under the ADEA).

The court of appeals' conclusion that *Hazen Paper* forecloses reliance on disparate impact theory under the ADEA is inconsistent with this Court's express reservation of that issue.

The court of appeals found it "instructive" (App., *infra*, 5a) that the Court stated in *Hazen Paper* that disparate treatment analysis "captures the essence of what Congress sought to prohibit in the ADEA." 113 S. Ct. at 1707. But that statement simply means that the prohibition of disparate treatment lies at the core of the ADEA. That statement does not answer or even address the question whether the ADEA also prohibits disparate impact discrimination.

The court of appeals also deemed it significant (App., *infra*, 6a-7a) that the ADEA exempts from its prohibitions actions that are based on "reasonable factors other than age." 29 U.S.C. 623(f)(1). In the court's view, that exception "suggests that decisions which are made for reasons independent of age but which happen to correlate with age are not actionable under the ADEA." App., *infra*, 6a-7a. Congress did not, however, create an exception for "any" factor other than age. See *County of Washington v. Gunther*, 452 U.S. 161, 169-171 (1981) (indicating that exception to Title VII for wage differentials based on a use of "any other factor other than sex" may preclude disparate impact analysis of gender-based compensation claims). Rather, it confined the exception to "reasonable" factors other than age. The clear implication of that limitation is that decisions based on factors other than age are subject to challenge under a disparate impact theory when they are not "reasonable," *i.e.*, when they are not job-related within the meaning of *Griggs*.

The Department of Labor, the agency initially charged with enforcing the ADEA, reached precisely that conclusion in its first set of guidelines under that statute. Those guidelines provided that, to qualify as a "reasonable factor other than age," a neutral standard would have to be "reasonably necessary for the specific work to be performed" or "shown to have a valid relationship to job requirements." 29 C.F.R. 860.103(f)(1)(i) and (f)(2) (1969). When the EEOC assumed responsibility for enforcing the ADEA, it adopted the same view. 29 C.F.R. 1625.7(d) (1994). The court of appeals erred in departing from this longstanding interpretation of the "reasonable factors" exception adopted by the agencies charged with enforcing the Act. See *EEOC v. Commercial Office Products Co.*, 486 U.S. 107, 115 (1988).

4. The court of appeals also concluded that, even assuming Section 4(a)(2) of the ADEA prohibits disparate impact discrimination, that Section is inapplicable in this case. The court of appeals noted (App., *infra*, 7a-8a) that the present version of Section 703(a)(2) of Title VII makes it unlawful for an employer "to limit, segregate, or classify his employees *or applicants for employment* in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee," 42 U.S.C. 2000e-2(a)(2) (emphasis added), while Section 4(a)(2) of the ADEA does not contain the italicized phrase. The court of appeals then reasoned that this difference in language indicates that Section 4(a)(2) protects only incumbent employees. App., *infra*, 7a-8a. That reasoning is seriously flawed.

By its express terms, Section 4(a)(2) is not limited to protecting incumbent employees. Although Section 4(a)(2) makes it unlawful for an employer "to limit, segregate, or classify his *employees*," the employer may not engage in such conduct "in any way which would deprive or tend to deprive any *individual* of employment opportunities," 29 U.S.C. 623(a)(2) (emphasis added). The use of the term "individual" rather than "employee" indicates that Section 4(a)(2) protects applicants for employment as well as incumbent employees. The present case illustrates one way in which the text of Section 4(a)(2) protects applicants for employment. Respondent "classif[ies] [its] employees" according to a pay scale that is based on experience, and that practice has had the effect of depriving an "individual" (*i.e.*, an applicant for employment) of an employment opportunity.

Congress's addition of the phrase "or applicants for employment" to Title VII does not detract from that conclusion. Congress added that phrase to Title VII in 1972 as part of a series of amendments to that Act. While Congress made several substantive changes to Title VII in 1972, the amendment to Section 703(a)(2) was technical in nature. As explained in the bill's Section-by-Section analysis, the sole purpose of the amendment was "*to make it clear* that discrimination against applicants for employment * * * is an unlawful employment practice." 118 Cong. Rec. 4943 (1972) (emphasis added). As Congress viewed it, the amendment was "merely * * * declaratory of present law." *Ibid.*

5. The court of appeals' construction of the ADEA significantly limits the scope of the protection afforded by that Act. While the protection against disparate treatment

is of undeniable importance in fulfilling the purposes of the ADEA, that protection alone is incomplete. When facially neutral practices serve as barriers to the employment of older workers and are maintained without a job-related justification, they can have economic and even psychological effects that may be indistinguishable from the effects of intentional discrimination. Congress believed that older workers, no less than those protected by Title VII, are in need of protection from such practices.

Since 1989, the EEOC has filed approximately 20 suits under the ADEA that have relied upon a disparate impact theory of liability. In those suits, the EEOC has challenged the following practices, among others: (1) refusing to consider for jobs those who have previously received a higher salary; (2) refusing to hire persons deemed overqualified; (3) restricting jobs to recent college graduates; (4) laying off persons who are eligible or nearly eligible to retire; and (5) denying job opportunities to those on pensions. Under the construction of the ADEA adopted by the Seventh Circuit, the EEOC would no longer be able to bring challenges of this kind. The unfortunate result would be to dilute significantly the protection against workplace discrimination afforded by the ADEA. This Court should grant review to settle the question whether older workers enjoy the same protection against discriminatory impacts as is applicable under Title VII.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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